

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 CLARK COUNTY NATURAL RESOURCES
4 COUNCIL and FUTUREWISE,

Case No. 09-02-0002

5 Petitioners,

6 v.

**AMENDED FINAL DECISION
AND ORDER**

7
8 CLARK COUNTY,

9 Respondent,

10 And,

11
12 JOHN AND GEORGIANA WARTA, GREEN
13 ARBOR DEVELOPMENT, INC., MATTHEW and
14 DENISE HOUGHTON, RICHARD W. SCHWARZ,
15 WALTER O. SCHWARZ, JONATHAN and
16 VICTORIA SCHWARZ,

17 Intervenors.

18
19 **I. SYNOPSIS**

20 The Board finds that CCNRC and Futurewise, as to Issue 1 and the Warta de-designation
21 portion of Issue 2, and Futurewise as to the Schwarz de-designation portion of Issue 2,
22 have sustained their burden of proof to establish the County's actions were clearly
23 erroneous. Additionally, the Board determines that the County's actions warrant a finding of
24 invalidity.
25

26
27 **II. PROCEDURAL HISTORY**

28 Clark County Natural Resources Council (CCNRC) and Futurewise (collectively Petitioners)
29 filed a Petition for Review (PFR) on February 12, 2009. The PFR challenges two provisions
30 of Ordinance No. 2008-12-15 (the Ordinance), entitled *Comprehensive Plan and UDC*
31 *Amendments*. John and Georgiana Warta and Green Arbor Development, Inc. (Warta),
32 Matthew and Denise Houghton (Houghton) and Richard W. Schwarz, Walter O. Schwarz,

Jonathan and Victoria Schwarz (Schwarz Family) subsequently sought and were granted the right to intervene.¹ CCNRC's Motion to Dismiss that portion of its Issue 2 as it related to the Schwarz properties was granted.² Motions to Dismiss were filed by Warta, Houghton, Schwarz and the County, all of which were denied.³

The Hearing on the Merits was held on July 1, 2009. The Petitioners appeared through their attorney, Robert A. Beattey. The County appeared through its attorney, Christine M. Cook. Intervenor Warta was represented by LeAnne M. Bremer. Intervenor Houghton was represented by Randall B. Printz. The Schwarz Family Intervenors were represented by Michael J. Wynne. Board members James McNamara, Nina Carter and William Roehl were present with Mr. Roehl presiding.

III. BURDEN OF PROOF

For the purposes of board review of the comprehensive plans and development regulations adopted by local government, the GMA establishes three major precepts: a presumption of validity; a "clearly erroneous" standard of review; and a requirement of deference to the decisions of local government.

Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and amendments to them are presumed valid upon adoption:

Except as provided in subsection (5) of this section, comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

The statute further provides that the standard of review is whether the challenged enactments are clearly erroneous:⁴

¹ Order Granting Intervention to John and Georgiana Warta and Green Arbor Development, Inc. (March 5, 2009); Order Granting Intervention to Richard W. Schwarz, Walter O. Schwarz, Jonathan and Victoria Schwarz (April 6, 2009); Order Granting Intervention to Matthew Houghton and Denise Houghton, husband and wife (March 17, 2009).

² Order Granting Motion To Dismiss, March 18, 2009.

³ Order Denying Motions To Dismiss, April 23, 2009.

⁴ RCW 36.70A.320(3).

1 The board shall find compliance unless it determines that the action by the state
2 agency, county, or city is clearly erroneous in view of the entire record before the
3 board and in light of the goals and requirements of this chapter.

4 In order to find the County's action clearly erroneous, the Board must be "left with the firm
5 and definite conviction that a mistake has been made."⁵
6

7 Within the framework of state goals and requirements, the boards must grant deference to
8 local governments in how they plan for growth.⁶

9 In recognition of the broad range of discretion that may be exercised by counties
10 and cities in how they plan for growth, consistent with the requirements and
11 goals of this chapter, the legislature intends for the boards to grant deference to
12 the counties and cities in how they plan for growth, consistent with the
13 requirements and goals of this chapter. Local comprehensive plans and
14 development regulations require counties and cities to balance priorities and
15 options for action in full consideration of local circumstances. The legislature
16 finds that while this chapter requires local planning to take place within a
17 framework of state goals and requirements, the ultimate burden and
responsibility for planning, harmonizing the planning goals of this chapter, and
implementing a county's or city's future rests with that community.

18 The burden is on Petitioners to overcome the presumption of validity and demonstrate that
19 any action taken by the County is clearly erroneous in light of the goals and requirements of
20 Ch. 36.70A RCW (the Growth Management Act).⁷ Where not clearly erroneous, and thus
21 within the framework of state goals and requirements, the planning choices of local
22 government must be granted deference.
23
24

25 IV. ISSUES TO BE DISCUSSED

26 **Issue 1:** By amending the Clark County Code to allow "facilities that repair, maintain or
27 refurbish or manufacture component parts for equipment utilized for agricultural, forest and
28 other resource based industries..." to be located in resource lands, has Clark County failed
29 to adopt comprehensive plan provisions and development regulations to conserve natural
30 resource lands and protect them from incompatible development and otherwise failed to
31

32 ⁵ *Dept of Ecology v. PUD1*, 121 Wn2d 179,201 (1993).

⁶ RCW 36.70A.3201.

⁷ RCW 36.70A.320(2).

1 comply with RCW 36.70A.020 (1-2, 5, 8-10, 12), 36.70A.040, 36.70A.050, 36.70A.060,
2 36.70A.070, 36.70A.170, and 36.70A.177? (Ordinance 2008-12-15 § 7(3)). (Footnote 9)

3 **Issue 2:** Whether Clark County's de-designation of agricultural land in applications
4 CPZ2008-00001 (Warta) and CPZ2008-00005 (Schwarz) violate RCW 36.70A.020 (1-2, 5,
5 8-10, 12), 36.70A.050, 36.70A.060, 36.70A.070, 36.70A.170, and 36.70A.177? (Ordinance
6 2008-12-15 §§ 2(1) and 3(1), respectively).

7 **Issue 3:** Whether the agricultural land de-designations and the Clark County Code
8 (Footnote 9) amendment warrant a finding of invalidity?

9 10 **V. DISCUSSION OF THE ISSUES**

11 The Petitioners' PFR challenges Clark County's adoption of Ordinance No. 2008-12-15
12 which, in regards to the present matter, amended the County's Comprehensive Plan and
13 Unified Development Code (UDC). Issue 1 is based on Clark County's amendment to UDC
14 40.210.010 which permitted commercial and industrial uses; specifically "facilities that
15 repair, maintain, or refurbish or manufacture component parts for equipment utilized for
16 agricultural, forest, and other resource based industries" to be located on natural resource
17 lands. Issue 2 is based on Clark County's site-specific de-designation of two parcels of
18 land, the Warta Parcel and the Schwarz Parcel, from agricultural lands of long-term
19 commercial significance to rural residential zoning.
20

21
22 Petitioners contend by this action Clark County violated various goals and requirements of
23 the GMA including, but not limited to, those provisions related to the maintenance and
24 conservation of natural resource lands.
25

26 As permitted by WAC 242-02-270(3)(a), the Board limited the intervenors participation in
27 this matter. Intervenor Houghton was permitted to submit argument only in regards to
28 Issue 1. Intervenor Warta, Green Arbor Development and Schwarz Family were permitted
29 to submit argument only in regards to Issue 2.
30

31 32 **Issue 1: UDC Amendment**

1 The Ordinance amended the County's UDC section 40.210.010, Forest, Agriculture, and
2 Agricultural-Wildlife District table 40.210.010-1, footnote number 9 (hereinafter "Footnote 9")
3 , as follows:⁸

4 Commercial uses supporting resource uses, such as parking⁹, first stage
5 processing and processing which provides value added to resource products as
6 well as facilities that repair, maintain or refurbish or manufacture component
7 parts for equipment utilized for agricultural, forest and other resource based
8 industries including wind, hydro and solar generation, but specifically not
9 including the establishment or siting of a wind, hydro or solar generating facility.
10 Chippers, pole yards, log sorting and storage, antique agricultural storage or
11 display, temporary structures(sic) for debarking, accessory uses including but not
12 limited to scaling and weigh operations, temporary crew quarters, storage and
13 maintenance facilities, disposal areas, sawmills producing ten thousand (10,000)
board feet per day or less, and other uses involved in the harvesting of forest
products.(amendatory language underlined).

14 Petitioners argue this UDC amendment would allow, for example, logging equipment
15 factories or diesel engine plants of any size to be located on agricultural lands.¹⁰ Their
16 position is that the amendment is so broadly written that it could "undermine the GMA
17 mandate to conserve agricultural lands for the maintenance and enhancement of the farm
18 industry".¹¹ Furthermore, Petitioners assert the language would allow uses unrelated to
19 agricultural land and uses in violation of RCW 36.70A.177(3)(b)(i) and (ii).¹² These
20 provisions read as follows:
21

22 (3) Accessory uses allowed under subsection (2)(a) of this section shall comply
23 with the following:

24 (a) Accessory uses shall be located, designed, and operated so as to not
25 interfere with, and to support the continuation of, the overall agricultural use of
26 the property and neighboring properties, and shall comply with the requirements
27 of this chapter;
28

29
30 ⁸ Ordinance No. 2008-12-15. Amendatory language underlined.

31 ⁹ The adopted language of Footnote 9 refers to "parking" while the word used elsewhere in the Record is
"packing". One would assume the latter is correct based on context.

32 ¹⁰ Petitioners' HOM Brief, at 9.

¹¹ Petitioners' HOM Brief, at 11.

¹² Petitioners' HOM Brief, at 13.

1 (b) Accessory uses may include:

2 (i) Agricultural accessory uses and activities, including but not limited to the
3 storage, distribution, and marketing of regional agricultural products from one or
4 more producers, agriculturally related experiences, or the production, marketing,
5 and distribution of value-added agricultural products, including support services
6 that facilitate these activities; and

7 (ii) Nonagricultural accessory uses and activities as long as they are
8 consistent with the size, scale, and intensity of the existing agricultural use of the
9 property and the existing buildings on the site. Nonagricultural accessory uses
10 and activities, including new buildings, parking, or supportive uses, shall not be
11 located outside the general area already developed for buildings and residential
12 uses and shall not otherwise convert more than one acre of agricultural land to
13 nonagricultural uses; and (1)(a) Except as provided in *RCW 36.70A.1701, each
14 county that is required or chooses to plan under RCW 36.70A.040, and each city
15 within such county, shall adopt development regulations on or before September
16 1, 1991, to assure the conservation of agricultural, forest, and mineral resource
17 lands designated under RCW 36.70A.170.

18 The County first argues that Petitioners abandoned alleged violations of any statute other
19 than RCW 36.70A.177.¹³ In regards the substance of Footnote 9, Clark County argues it
20 was adopted "precisely to maintain and enhance the agricultural industry as it exists in Clark
21 County."¹⁴ In support of that statement, Clark County refers to the Planning Commission
22 debate which it characterizes as focusing " . . . on the needs of the agricultural industry in
23 Clark County for support services, including the manufacture and repair of parts for
24 machinery that supports resource uses".¹⁵ "Testimony before the County concerned the
25 disappearance of needed agricultural infrastructure and support"¹⁶

26 Intervenor Houghton focuses on the first sentence of Goal 8 of the GMA:¹⁷

27 Natural resource industries. *Maintain and enhance natural resource-based*
28 *industries, including productive timber, agricultural, and fisheries industries.*

30
31 ¹³ County HOM Brief, at 8.

32 ¹⁴ Respondent Clark County's Prehearing Brief at 8

¹⁵ Id. at 8, 9

¹⁶ Id at 9

¹⁷ RCW 36.70A.020(8)

1 Encourage the conservation of productive forest lands and productive agricultural
2 lands, and discourage incompatible uses.

3 In addition, Houghton states that the amendment of Footnote 9 merely served to clarify the
4 meaning of the language of the footnote as originally written, language which was initially
5 adopted in 1995 and is thus presumed valid.¹⁸
6

7 Houghton further suggests that the Washington State Supreme Court's *City of Redmond*
8 decision supports the County's adopted language as it serves to "ensure the viability of the
9 resource-based industries".¹⁹ They also argue that Footnote 9 is consistent with WAC 365-
10 195-825 as it fulfills Clark County's obligation to implement development regulations
11 designed to assure natural resource lands will remain available to be used for commercial
12 production.²⁰
13

14
15 Finally, Houghton states that Footnote 9 represents an innovative technique allowed by
16 RCW 36.70A.177 which will not result in the removal of any land from the County's supply of
17 land to support and protect agricultural and other resource lands.²¹
18

19 In regards the allegation by the County and Schwarz that Petitioners abandoned specific
20 GMA section violations originally alleged in their Petition for Review, the Petitioners state
21 they specifically referenced RCW 36.70A.177 in their Prehearing Brief and that RCW
22 36.70A.020(8) and 36.70A.060 were referenced in the *Lewis County* decision quoted in their
23 briefs.²² Additionally, the Petitioners specifically referenced alleged violations of numerous
24 GMA goals RCW 36.70A.020, 36.70A.040, 36.70A.060, 36.70A.170 and 36.70A.177 at oral
25 argument. Petitioners also state that it is important to note the overlap of various sections of
26 the GMA and the numerous sections that are implicated when alleging noncompliance.²³
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30 _____
31 ¹⁸ Houghton's Response Brief at 4.

32 ¹⁹ King County v. Central Puget Sound Growth Mgmt. Hearings Board, 142 Wn. 2d 543.

²⁰ Houghton at 5.

²¹ Id at 7.

²² Petitioners Reply Brief at 4.

²³ Id.

1 Board Discussion

2 Initially, it is beneficial to restate that the GMA places the burden on Petitioners to overcome
3 the presumption of validity afforded to the County's actions. RCW 36.70A.320(1), .320(2).

4 In order to satisfy this burden and overcome the presumption of validity, the Petitioners must
5 demonstrate that the County's action was clearly erroneous in view of the entire record and
6 in light of the goals and requirements of the GMA. RCW 36.70A.320(3).
7

8 The County's initial argument is that the Petitioners abandoned any alleged GMA violations
9 other than of RCW 36.70A.177. However, the Board finds that the Petitioners' arguments
10 were sufficiently clear to alert the parties, and the Board, of their position that the Footnote 9
11 amendments violated numerous RCW 36.70A.020 goals, 36.70A.040, 36.70A.060,
12 36.70A.170 and 36.70A.177. Those sections were in fact referenced either directly, by
13 implication, or by citation in their briefing, and at oral argument.²⁴
14
15

16 The Board's analysis begins with RCW 36.70A.020(8):

17 Natural resource industries. *Maintain and enhance natural resource-based*
18 *industries, including productive timber, agricultural, and fisheries industries.*
19 Encourage the conservation of productive forest lands and productive agricultural
20 lands, and discourage incompatible uses.

21 RCW 36.70A.060(1)(a) provides a more specific mandate:

22 . . . each county that is required or chooses to plan . . . shall adopt development
23 regulations . . . to assure the conservation of agricultural, forest, and mineral
24 resource lands designated under RCW 36.70A.170.

25 Finally, RCW 36.70 A.177(1) authorizes counties to choose how best to conserve
26 designated agricultural lands by providing: (in relevant part)

27 A county or city may use a variety of innovative zoning techniques in areas
28 designated as agricultural lands of long-term commercial significance under RCW
29 36.70A.170. The innovative zoning techniques should be designed to conserve
30 agricultural lands and encourage the agricultural economy.
31
32

²⁴ Petitioners' HOM Brief at 10,12.
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1 It must be noted that the language of Footnote 9, prior to the 2009 amendment, authorized
2 " commercial uses supporting resource uses", and that language has been codified in one
3 form or another since 1995. It is thus presumed valid and a challenge to this language
4 would be untimely. If the added language merely clarifies the original, it too would be
5 presumed valid.
6

7 Having said that, the Board cannot agree with Houghton's assertion that the amendment
8 merely serves to clarify the original language. The clause "as well as" can only be
9 interpreted as "and" or "also". Thus, the clause " as well as facilities that repair, maintain or
10 refurbish or manufacture component parts for equipment utilized for agricultural, forest or
11 other resource-based industries including wind, hydro and solar generation . . ." is
12 interpreted to be an additional listing or category of uses allowed within the zones to which
13 Footnote 9 applies. Furthermore, the original language referred to "commercial uses
14 supporting resource uses, such as parking, first stage processing and processing which
15 provides value added to resource products". "Facilities that repair, maintain, refurbish or
16 manufacture component parts for equipment utilized" cannot be interpreted to be included
17 within the meaning or parameters of "parking, first stage processing and processing which
18 provides value added".²⁵
19
20
21

22 Having reached that conclusion, does the amended language of Footnote 9 satisfy the GMA
23 mandate to conserve agricultural lands and encourage the agricultural economy? Clearly,
24 the GMA allows counties to employ "innovative" zoning techniques in agriculturally
25 designated areas with the caveat that such techniques should be designed to conserve
26 agricultural lands and encourage the agricultural economy.²⁶ Furthermore, non-agricultural
27 uses within designated agricultural resource lands should be limited to lands with poor soils
28 or otherwise unsuitable for agricultural production.²⁷
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32 ²⁵ The full language of Footnote 9 is Ex. 24 as referenced at Section 7, pg. 7, of the Ordinance, (Ex. 1).

²⁶ RCW 36.70A.177(1).

²⁷ RCW 36.70A.177(1).

1 Some of the uses contemplated by Footnote 9 are agriculturally related (facilities that repair,
2 maintain or refurbish or manufacture component parts for equipment utilized for agricultural .
3 . . industries), while others are not (facilities that repair, maintain or refurbish or manufacture
4 component parts for equipment utilized for forest and other resource-based industries
5 including wind, hydro and solar generation).
6

7 Of significance is the type of innovative zoning techniques suggested for agricultural lands
8 set forth in RCW 36.70A.177(2): (Emphasis added)
9

10 (a) Agricultural zoning, which limits the density of development and restricts or
11 prohibits nonfarm uses of agricultural land and *may allow accessory uses,*
12 *including nonagricultural accessory uses and activities, that support, promote, or*
13 *sustain agricultural operations and production,* as provided in subsection (3) of
this section;

14 (b) Cluster zoning, which allows new development on one portion of the land,
15 leaving the remainder in agricultural or open space uses;

16 (c) Large lot zoning, which establishes as a minimum lot size the amount of land
17 necessary to achieve a successful farming practice;

18 (d.) Quarter/quarter zoning, which permits one residential dwelling on a one- acre
19 minimum lot for each one-sixteenth of a section of land; and.
20

21 (e) Sliding scale zoning, which allows the number of lots for single-family
22 residential purposes with a minimum lot size of one acre to increase inversely as
23 the size of the total acreage increases.

24 All of these techniques are designed to minimize the built environment on the land-
25 presumably to comply with the RCW 36.70A.177(1) goal of conserving agricultural lands
26 and encouraging the agricultural economy.
27

28 Clark County and Houghton stress that the types of uses authorized by Footnote 9 are
29 exactly the types of uses contemplated by RCW 36.70A.177: "uses that encourage the
30 agricultural economy" and that "support . . . or sustain agricultural operations and
31 production". That could be true, depending on the size and scale of the use as well as its
32 nature (whether it is related to agriculture or not). Contrast the size and scale of a business

1 which maintains or refurbishes tractors with the size and scale of an industry which
2 manufactures diesel engines as a component part for tractors.

3
4 Clark County and Houghton, while referring to some of language of RCW 36.70A.177, fail to
5 address RCW 36.70A.177(2)(a) and 36.70A.177(3). RCW 36.70A.177(2)(a) suggests
6 density of development should be limited and nonfarm uses of agricultural land should be
7 restricted or prohibited. Furthermore, RCW 36.70A.177(2)(a) allows for both agricultural
8 and non-agricultural uses within agricultural zones, but only as "accessory uses". The uses
9 contemplated by the amendments to Footnote 9 do include both agricultural and
10 nonagricultural uses, but they are not limited by the language to "accessory uses" and are
11 not limited to uses and activities that "support, promote or sustain agricultural operations
12 and production".
13

14
15 RCW 36.70A.177(2) refers to 36.70A.177(3) in regards the allowance of accessory uses:

16 Accessory uses allowed under subsection (2) (a) of this section shall comply with
17 the following:

18 (a) Accessory uses shall be located, designed, and operated so as to not
19 interfere with, and to support the continuation of, the overall agricultural use of
20 the property and neighboring properties, and shall comply with the requirements
21 of this chapter;

22 (b) Accessory uses may include:

23 (i) Agricultural accessory uses and activities, including but not limited to the
24 storage, distribution, and marketing of regional agricultural products from one or
25 more producers, agriculturally related experiences, or the production, marketing,
26 and distribution of value- added agricultural products, including support services
27 that facilitate these activities; and

28 (ii) Nonagricultural accessory uses and activities as long as they are consistent
29 with the size, scale, and intensity of the existing agricultural use of the property
30 and the existing buildings on the site. Nonagricultural accessory uses and
31 activities, including new buildings, parking, or support of uses, shall not be
32 located outside the general area already developed for buildings and a
33 residential uses and shall not otherwise convert more than one acre of
34 agricultural land to nonagricultural uses (RCW 36.70A.177(3) in relevant part)

1 The agricultural accessory uses contemplated by the Footnote 9 amendments do not meet
2 the RCW 36.70A.177(3)(a) and (b)(i) requirements. There is no restriction reflected in the
3 record requiring that the location, design, and operation not interfere with, and in fact
4 support, the overall agricultural use of the property. Furthermore, the types of agricultural
5 uses allowed must be read in the context of the list of agricultural uses contemplated by
6 RCW 36.70A.177(b)(i). Thus, although the list is not exclusive, allowed agricultural uses
7 must be related to the types of activities contemplated by the list and must be limited to uses
8 accessory in nature.
9

10
11 The contemplated nonagricultural uses do not meet the RCW 36.70A.177(3)(a) and
12 36.70A(3)(b)(ii) requirements. Again, there is nothing in the record which would require that
13 these uses be consistent with size, scale and intensity of the existing agricultural use of the
14 property and the existing buildings on site. There is nothing in the record which would
15 require that these uses be located within the general area developed for buildings and
16 residential uses. Nor is there a one acre limitation on conversion of agricultural land.
17 Finally, there is no requirement that the location, design, and operation not interfere with,
18 and in fact support, the overall agricultural use of the property.
19

20
21 RCW 36.70A.177(2)(a) allows nonagricultural accessory uses that support, promote, or
22 sustain agricultural operations and production. Clark County and Houghton stress the types
23 of uses authorized by Footnote 9 are exactly the types of uses contemplated by that statute:
24 "uses that encourage the agricultural economy" and that "support . . . or sustain agricultural
25 operations and production". However, it cannot be said that the repair, maintenance,
26 refurbishment or manufacture of component parts for equipment utilized for forest and other
27 resource-based industries, including wind, hydro and solar generation, would support,
28 promote or sustain agricultural operations and production.
29

30
31 "Agricultural land " is defined as land primarily devoted to the commercial *production of*
32 horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products or of
berries, grain, hay, straw, turf, seed, Christmas trees, finfish in upland hatcheries, or

1 livestock, and that has long-term commercial significance for agricultural production.²⁸ Many
2 of the types of agricultural uses contemplated by the Footnote 9 amendments are only
3 indirectly related to production. The nonagricultural uses are unrelated to production and do
4 not serve to support, promote, or sustain operations or production. As the size or scale of
5 those uses increases, land is no longer primarily devoted to production. Also, as the size
6 and scale increase, the result would necessarily be the elimination of lands actually devoted
7 to *production* of agricultural products.
8

9
10 If, as the County suggests, there is a concern for maintaining agricultural support services,
11 that concern can be met by limiting non-production uses to those which are related to
12 agriculture and by limiting their size and scale; that is, by limiting them to accessory uses as
13 contemplated by RCW 36.70A.177.²⁹
14

15 **Conclusion:** The Petitioners have met their burden of proof. The Board finds that the
16 amendments to Footnote 9 violate RCW 36.70A.177, 36.70A.020(1),(2), and (8), and
17 36.70A.060.
18

19 **Issue 2: Agricultural Land De-Designation.**

20 Futurewise, as to the Schwarz and Warta properties, and CCNRC as to the Warta
21 properties,³⁰ state the County violated the GMA's mandate to conserve agricultural lands by
22 de-designating these lands.³¹ Petitioners assert that the County previously designated the
23 properties in question as agricultural lands of long-term commercial significance and, having
24 done so, it is conclusively established that the County followed a reasoned process and
25
26

27 ²⁸ RCW 36.70A.030(2).
28

29 ²⁹ The Board notes that Clark County's Jeff Niten of Community Planning referred to the uses contemplated by
30 the amendment to Footnote 9 as "accessory uses" during a presentation to the Planning Commission on
31 October 16, 2008. Ex. 12, pg 3. However, the Record does not support a finding that the uses are to be
32 accessory in nature. The discussion of the proposed amendment at the Planning Commission illustrates the
concern over the potentially unlimited size and scale of allowed uses under the amendment. Ex. 12.

³⁰ CCNRC's Motion to Dismiss its challenge to the de-designation of the Schwarz properties was granted by
order dated March 18, 2009. Any reference to "Petitioners" in this FDO is a reference only to Futurewise
when addressing the Schwarz properties.

³¹ Futurewise HOM Brief, at 13 (citing RCW 36.70A.020(8) and RCW 36.70A.060(1)(a)).

1 considered the RCW 36.70A.020(8) mandatory goal and the designation requirements
2 enumerated by the Washington Supreme Court.³² They argue the record contains no
3 information regarding substantive changes that would require reconsideration of the
4 designation.

5
6 Petitioners point to the Washington Supreme Court three-part test set forth in *Lewis County*
7 *vs. Western Washington Growth Management Hearings Board*³³ for identifying agricultural
8 land of long-term commercial significance and argue the record contains no consideration of
9 the *Lewis County* criteria.³⁴ Furthermore, they argue the de-designated parcels continue to
10 satisfy all three factors set forth in the *Lewis County* decision.³⁵ Finally, Petitioners state
11 that the GMA mandates preservation of productive farmland areas and that a parcel by
12 parcel approach to de-designation is clearly inappropriate, quoting the Washington
13 Supreme Court: "We hold land is 'devoted' to agricultural use under RCW 36.70A.030 if it is
14 in an *area* where the land is actually used or capable of being used for agricultural
15 production".³⁶

16
17
18 The County asserts there is substantial evidence in the record to support its decision and
19 that the Board is bound by the Supreme Court's *City of Arlington*³⁷ decision and RCW
20 36.70A.3201.³⁸
21

22
23 _____
24 ³² Futurewise HOM Brief, at 15.

25 ³³ 157 Wn. 2d 488 (2006).

26 ³⁴ Futurewise HOM Brief, at 15-16.

27 ³⁵ Futurewise HOM Brief, at 16.

28 ³⁶ Futurewise HOM Brief, at 14-15 (citing *City of Redmond v. Central Puget Sound Growth Management*
29 *Hearings Board*, 136 Wn2d 38,53 (1998)).

30 ³⁷ *City of Arlington v. Central Puget Sound Growth Management Hearings Board*, 164 Wn.2d 768. In that
31 decision, the County argues that when the record indicates a locality considered substantial evidence bearing
32 on factors lawfully relevant to its decision, the Hearings Board must defer to the County.

³⁸ County Response Brief, at 11, citing *Arlington* and RCW 36.70A.3201, which provides: ". . . the legislature
intends that the boards apply a more deferential standard of review to actions of counties and cities than the
preponderance of the evidence standard provided for under existing law. In recognition of the broad range of
discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the
legislature intends for the boards to grant deference to counties and cities in how they plan for growth,
consistent with the requirements and goals of this chapter. Local comprehensive plans and development
regulations require counties and cities to balance priorities and options for action in full consideration of local
circumstances." RCW 36.70A.3201, in part.

1 Warta similarly stresses the standard of review as laid out in *City of Arlington*³⁹ and points
2 out in detail what it refers to as overwhelming evidence in the record supporting the
3 County's decision to re-designate the Warta properties from Ag 20 to Rural 5.⁴⁰ Warta
4 argues the Petitioners merely suggest there is also evidence in the record which would
5 support a contrary decision by the County and suggests that the "relevant question is
6 whether the Board (the Board of County Commissioners) relied on evidence addressing the
7 legal criteria supporting its decision".⁴¹ Warta further argues Petitioners failed to timely
8 challenge the rezone portion of the County's decision and it is therefore a final decision.⁴² In
9 reply to Petitioners' assertion that the GMA requires preservation of areas of productive
10 farmland, the County suggests that is an "interesting theory" but not a requirement of the
11 GMA.⁴³
12

13
14 The County attempts to reargue its motion by which it sought dismissal of Futurewise's
15 challenge as related to Schwarz. It states that the decision to change these properties from
16 agriculture to rural was made in 1998, that a mapping error occurred and consequently the
17 change was not reflected on the County maps, and that the Ordinance reflected that earlier
18 decision.
19

20
21 Schwarz similarly argues that the Ordinance merely corrected a 1998 mapping error. In
22 addition, Schwarz argues their properties do not meet the *Lewis County* test for defining
23 agricultural lands.
24

25 In response, the Petitioners suggest that Warta's argument would require a ruling in favor of
26 the County if there is any evidence whatsoever to support its decision.⁴⁴ Their position is
27 that the Board must find that the evidence relied on by the County supports the conclusion
28

29
30 _____
31 ³⁹ Intervenor Warta and Green Arbor Development, Inc.'s Prehearing Brief at 8.

32 ⁴⁰ Id. at 11.

⁴¹ Id. at 11.

⁴² Id. at 4.

⁴³ Respondent Clark County's Reply Brief at 11.

⁴⁴ Petitioners' Reply Brief at 9

1 that the land does not have long-term commercial significance and they allege there is no
2 such finding in the Ordinance.⁴⁵

3
4 Futurewise responds that, as to the Schwarz properties, the Board's earlier order denying
5 the County's and Schwarz's motions to dismiss disposed of the issue regarding a mapping
6 error.

7
8 Board Discussion

9 • **Warta Properties**

10 The Warta properties consist of three parcels totaling approximately 60 acres.⁴⁶ Intervenor
11 Warta requested the County amend the Comprehensive Plan and applicable zoning from
12 Resource Lands Agriculture with R-20 zoning to Rural 5 and R-5 zoning. Following review
13 by County planning staff and the Planning Commission, the Board of County
14 Commissioners adopted the Ordinance which granted the requested amendments.

15
16
17 Two of the Warta properties are improved with single-family residences and outbuildings,
18 the third is unimproved. Two of the parcels, totaling 55 acres, currently support the grazing
19 of cattle and qualify for a reduced tax assessment based on the agricultural use. Soil
20 quality is low to moderately high, drainage varies from well-drained to poor, water capacity
21 is moderate and permeability is moderate to very slow. The USDA Soil Conservation
22 Service's survey classifies the soil type as moderately productive. Strawberries, cane fruits
23 and tree fruits can be grown on the soils without irrigation. The soils are not classed as
24 "prime" agricultural soil. The properties are in close proximity to areas developed for rural
25 residences and the property is immediately adjacent to the Washougal Urban Growth
26 Area.⁴⁷ The majority of the properties nearby, whether zoned R-5 or Ag-20, have been
27 subdivided to 5 and 10 acre parcels. Notwithstanding the subdivision of properties in the
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29

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31 ⁴⁵ Petitioners' Reply Brief at 9, 10.

32 ⁴⁶ Two 5 acre parcels and one of 50 acres.

⁴⁷ This Board found in Case No. 07-2-0027 that the Washougal Urban Growth Area expansion did not comply with the GMA and was invalid. That decision was reversed by the Clark County Superior Court. The Superior Court decision is now on appeal.

1 area, lands to the North and East of the Warta properties are designated agriculture with
2 Ag-20 zoning.⁴⁸

3
4 It is appropriate to first address the Warta argument that the rezone portion of the County's
5 decision is a final land use decision and this Board lacks jurisdiction to consider it. Warta
6 cites *Wenatchee Sportsman* for support of their argument.⁴⁹ It is true that the Growth
7 Management Hearings Boards do not have jurisdiction over site-specific rezone proposals
8 when they are already authorized by a comprehensive plan. Such challenges are to be filed
9 under LUPA.⁵⁰ However, in the matter before us, the County had to amend its
10 comprehensive plan as well as the applicable zoning.⁵¹ In that situation, the Growth
11 Management Hearings Boards do have jurisdiction to address both amendments: the
12 comprehensive plan and zoning changes.⁵²

13
14
15 The preservation of agricultural lands and the agricultural industry receives particular
16 attention in the Growth Management Act. RCW 36.70A.020(8) is the natural resource
17 industries goal:

18 Maintain and enhance natural resource-based industries, including . . .
19 agricultural . . . industries. Encourage the conservation of productive . . .
20 agricultural lands, and discourage incompatible uses.

21 RCW 36.70A.170(1)(a) required counties to designate agricultural lands on before
22 September 1, 1991. That designation requirement was the first mandated step for counties
23 to accomplish, prior to adoption of comprehensive plans and the establishment of urban
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29 ⁴⁸ The information set forth in this paragraph is taken from the County Planning Staff Report dated October 23,
2008. Ex. 15, pgs 1-12.

30 ⁴⁹ *Wenatchee Sportsman v. Chelan County*, 141 Wn2d 169 (2000).

31 ⁵⁰ Chapter 36.70B RCW.

32 ⁵¹ Ex. 1 at pg. 3 of 8: "The Clark County 20- Year Comprehensive Growth Management Plan Map Designation
and corresponding Zoning Map for that certain property . . . (Warta) . . . is hereby amended from Resource
Lands Agriculture (AG-20) to Rural 5 (R-5) . . . "

⁵² See *Wenatchee Sportsman* and *Woods v. Kittitas County*, 162 Wn2d 597 (2007).

1 growth areas. "The significance of agricultural land preservation in the GMA can be seen in
2 the very timing of key actions mandated in the statute."⁵³

3
4 The purpose of setting aside natural resource lands, including agricultural lands, was clearly
5 elucidated by the *Redmond* court:

6 Natural resource lands are protected not for the sake of their ecological role *but*
7 *to ensure the viability of the resource-based industries that depend on them.*
8 Allowing conversion of resource lands to other uses by allowing incompatible
9 uses nearby impairs the viability of the resource industry.⁵⁴

10 The GMA definition of agricultural lands is found at RCW 36.70A.030 (2):

11 "Agricultural land" means land primarily devoted to the commercial production of
12 horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products
13 or of berries, grain, hay, straw, turf, seed, Christmas trees . . . finfish in upland
14 hatcheries, or livestock, and that has long-term commercial significance for
15 agricultural production.

16 "Long-term commercial significance" is defined at RCW 36.70A.030 (10):

17 "Long-term commercial significance " includes the growing capacity, productivity,
18 and soil composition of the land for long-term commercial production, in
19 consideration with the land's proximity to population areas, and the possibility
20 of more intense uses of the land.

21 The *Redmond* court specifically addressed the "devoted to" language used in RCW
22 36.70A.030 (2): (Emphasis added)

23 We hold land is "devoted to" agricultural use under RCW 36.70A.030 if it is in an
24 **area** where the land is actually used or capable of being used for agricultural
25 production. . . . While the land use on the particular parcel and the owner's
26 intended use for the land may be considered along with other factors in the
27 determination of whether a parcel is in an **area** primarily devoted to commercial
28 agricultural production, neither current use nor landowner intent of a particular
29 parcel is conclusive for purposes of this element of the statutory definition.⁵⁵

30
31 ⁵³ City of Redmond v. Central Puget Sound Growth Management Hearings Board, 136 Wn2d 38,

32 ⁵⁴ *Redmond* quoting Richard L. Settle and Charles G. Gavigan, *The Growth Management Revolution in*
Washington: Past , Present, and Future, 16 U. Puget Sound L. Review 1141,1145 (1993).

⁵⁵ *Redmond* at 53.

1 Once agricultural lands have been designated under RCW 36.70A.170, RCW
2 36.70A.060(1) directs counties to adopt development regulations that "assure the
3 conservation of agricultural lands". Additionally, RCW 36.70A.177, as discussed above,
4 suggests counties employ innovative zoning techniques designed to "conserve agricultural
5 land and encourage the agricultural economy".
6

7 Having said that, the GMA does not require that agricultural lands remain designated in
8 perpetuity. Furthermore, the GMA does not delineate how a County is to determine that
9 lands once designated as agriculture should then be de-designated. The analysis
10 employed by the Boards and by the Washington Supreme Court has been to apply the
11 same statutory criteria for purposes of de-designation used when designating such lands.⁵⁶
12 As stated in *Lewis County*, the legislature established that agricultural lands are those which
13 (1) are not already characterized by urban growth, (2) are "primarily devoted to" commercial
14 agricultural production, and (3) have "long-term commercial significance" for such
15 production.⁵⁷ Land is primarily devoted to commercial agricultural production if it is in an
16 area where the land is actually used or capable of being used for agricultural production.⁵⁸
17 Long-term commercial significance includes the growing capacity, productivity, and soil
18 composition of the land for long-term commercial production, in consideration with the lands
19 proximity to population areas, and the possibility of more intense uses of the land.⁵⁹
20
21
22

23 What troubles the Board is that the almost pinpoint analysis of the Warta properties fails to
24 focus on areas devoted to agricultural use and the needs of the agricultural industry within
25 Clark County. The Board cannot fault Clark County for its staff analysis regarding the
26 agricultural significance of the Warta properties in isolation. That analysis appears in a
27
28
29

30 ⁵⁶ *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn2d 38 (1998); *City*
31 *of Arlington v. Central Puget Sound Growth Management Hearings Board*, 164 Wn2d 768; Karpinski, CCNRC
32 and Futurewise v. Clark County (Amended Final Decision and Order, June 3, 2008) at 44.

⁵⁷ *Lewis County* at 493.

⁵⁸ *Lewis County* at 493.

⁵⁹ RCW 36.70A.020(2), 36.70A.020(10), *Lewis County* at 494.

1 fifteen page staff report dated October 23, 2008.⁶⁰ In fact, the County's analysis
2 substantially follows the *Lewis County* methodology for agricultural land designation. What it
3 fails to do is to incorporate the *Redmond* decision's directives to "ensure the viability of the
4 resource-based industries" and the need to consider *areas* of agricultural production, let
5 alone the goal of RCW 36.70A.020(8) to "maintain and enhance natural resource-based
6 industries".
7

8 Furthermore, the GMA mandates of RCW 36.70A.060 and .170 to designate and conserve
9 agricultural lands must also be read in the context of the .020(8) goal. As our Supreme
10 Court stated in a different context:
11

12 We are required to read legislation as a whole, and to determine intent from
13 more than a single sentence. Effect should be given to all of the language used,
14 and the provisions must be considered in relation to each other, and harmonized
15 to ensure proper construction.⁶¹

16 The Board finds that it must do just that. That is, seek to harmonize the various provisions
17 of the GMA. How can a jurisdiction enhance natural resource-based industries and
18 encourage the agricultural economy if it focuses solely on the characteristics of a parcel or a
19 limited number of parcels of land?
20

21 Thus, in analyzing the County's decision to de-designate the Warta properties, the Board
22 finds that the key question to be addressed is whether the de-designation decision can be
23 made based on a parcel by parcel analysis or whether the analysis must be of a broader
24 nature, an analysis encompassing an agricultural *area*.
25

26 The GMA emphasis is broader than conservation of parcels of agricultural land on a site-
27 specific basis. Rather, in order to preserve or foster the agricultural economy, one needs to
28 focus on the agricultural industry as a whole. It would behoove the County, prior to further
29 review of lands proposed for de-designation (or designation), to consider what area or areas
30
31

32

⁶⁰ Exhibit 15.

⁶¹ King County v. Central Puget Sound Growth Management Hearings Board, 142.Wn2d 543, 560.

1 should be included during review. The scope of that focus would be dictated by the nature
2 of the agricultural activity conducted, or capable of being conducted, on the properties
3 considered for de-designation.
4

5 The viability of the agricultural industry involves more than the mere conservation of land for
6 production. There must be a significant base of land and production to support all of the
7 agriculturally based businesses that are part of the industry, including processors, suppliers,
8 shippers, cold storage plants, equipment repairers, and so on. In combination, the lands,
9 producers and support businesses constitute the agricultural economy. As stated above
10 "natural resource lands are protected . . . to ensure the viability of the natural resource-
11 based industry that depends on them". If a jurisdiction fails to take a broader view, and
12 chooses to de-designate agricultural lands on a parcel by parcel basis, it is inevitable that
13 the jurisdiction eventually reaches a point where the agriculture production base decreases
14 to such an extent that elements of the support industry cannot survive economically. That
15 process continues as the production side of the industry is unable to obtain services, thus
16 leading to further conversion of agricultural lands to non-agricultural uses. The long-term
17 result is the disappearance of the agricultural industry. Unfortunately, Clark County's
18 analysis focuses almost exclusively on the land itself and fails to focus as well on the needs
19 of the agricultural economy. That analysis fails to consider the goal of RCW 36.70A.020(8)
20 or the requirements of RCW 36.70A.60 and 36.70A.170. As stated by the Supreme Court:
21 (Emphasis added)
22

23
24 "The County is to *conserve agricultural land in order to maintain and enhance*
25 *the agricultural industry* and discourage incompatible uses".⁶²
26

27 Maintenance and enhancement of the agricultural industry cannot be accomplished
28 employing a parcel by parcel analysis.

29 "The Legislature intended the *land use planning process of GMA to be area-*
30 *wide in scope* when it required development of specific plans for natural
31 resource lands and, later, comprehensive plans."⁶³
32

⁶² *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn2d 543, 557.

⁶³ *Redmond v. CPSGMHB*, 136 Wn2d 38, 52.

1 **Conclusion:** The Petitioners have met their burden of proof. The Board finds in de-
2 designating the Warta properties from agriculture to rural, Clark County failed to consider
3 areas devoted to agricultural use, the viability of the agriculture industry or the goal to
4 maintain and enhance the agricultural-based industry and thus violated RCW 36.70A.020(2)
5 and (8), RCW 36.70A.060 and RCW 36.70A.170.
6

7 • **Schwarz Properties**

8 The bases for both the County and Schwarz Family motions to dismiss were that the
9 redesignation of the Schwarz Family properties occurred in 1998 with Clark County's
10 adoption of Ordinance No. 1998-07-19. The moving parties argued notice of adoption of the
11 1998 Ordinance was published on August 3, 1998 and any challenge should have been
12 filed within 60 days of that publication. This argument was fully addressed by the Board
13 previously and found to be without merit.⁶⁴ "The 2008 review and legislative decision clearly
14 resulted in redesignation of the Schwarz Family properties, was required to comply with the
15 GMA, and challenges based on a failure to designate in a GMA compliant manner are now
16 appropriate."⁶⁵
17
18

19 The Schwarz application in 2008 was processed as a request to re-designate their
20 properties from Resource Lands Agriculture to Rural Residential.⁶⁶
21

22 The difficulty the Board faces in addressing the County's decision to de-designate the
23 Schwarz properties in 2008, is that there is a dearth of analysis in the record. Rather, the
24 County merely concluded that a mapping error had been made in 1998 and agreed to take
25 action to "correct" that error. As stated above, the County's Prehearing Brief merely
26 reiterated a condensed version of its argument in support of its motion to dismiss. While
27 Schwarz argued their properties do not qualify as agricultural land, there is very little
28 analysis of that issue in the record. The record evidence indicates that the three Schwarz
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30
31

32 ⁶⁴ Order Denying Motions to Dismiss, April 23, 2009.

⁶⁵ Id at 3.

⁶⁶ Exhibit 13, pg. 1.

1 properties total approximately 57 acres. The existing land use is agriculture. All three
2 parcels are improved with a single family residence and the land is used and taxed at
3 current use as farmland. It appears that approximately 66% of the land is prime farmland
4 and is adjacent to a larger area consisting primarily of prime farmland.⁶⁷
5

6 From the record, it appears quite likely that a mapping error was made in 1998 following the
7 County's decision to de-designate. Unfortunately, the Comprehensive Plan maps were not
8 changed. Additionally, the County adopted a revised Comprehensive Plan in 2007 and the
9 Schwarz properties were again designated as agricultural land.
10

11 A de-designation of agricultural land decision must follow an analysis comparable to that for
12 designation of such lands. That did not occur in relationship to the Schwarz properties.
13 Neither was there any analysis of the viability of the agriculture industry, consideration of
14 areas of agricultural use or the goal to maintain and enhance the agriculture industry, as
15 discussed above in regards to the Warta properties.
16
17

18 **Conclusion:** The Petitioners have met their burden of proof. The Board finds in de-
19 designating the Schwarz properties from agriculture to rural, Clark County failed to consider
20 areas devoted to agricultural use, the viability of the agriculture industry or the goal to
21 maintain and enhance the agricultural-based industry and thus violated RCW 36.70A.020(2)
22 and (8), RCW 36.70A.060 and RCW 36.70A.170.
23

24 **INVALIDITY**

25 Issue No. 3: Whether the Board should enter a finding of invalidity pursuant to the
26 terms of RCW 36.70A.302 for substantial interference with the fulfillment of GMA goals?
27 Petitioners request the Board find that the non-compliant sections of the challenged
28 Ordinance be found to substantially interfere with the goals of the GMA. When the Board
29 makes a finding of noncompliance, the Board may also find that the continued validity of
30
31
32

⁶⁷ Exhibit 13, pgs. 1-3.
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1 part of a plan or regulation would substantially interfere with the fulfillment of the goals of the
2 GMA. RCW 36.70A.302(1)(b). The effect of an invalidity finding is that any development
3 permit application not vested before receipt of the Board's order by the County, "vests to the
4 local ordinance or resolution that is determined by the board not to substantially interfere
5 with the fulfillment of the goals of this chapter." RCW 36.70A.302(3)(a).
6

7 We have held that a test for imposition of invalidity is whether the continued validity of the
8 challenged and non-compliant enactment would interfere with the fulfillment of the GMA's
9 goals.⁶⁸ In this case, for the reasons noted *supra*, the Board has concluded that Clark
10 County's adoption of Ordinance 2008-12-15, specifically the amendatory language of UDC
11 40.210.010, Footnote 9, and the de-designation of the Warta and Schwarz properties failed
12 to comply with various provisions of the GMA.
13

14
15 The non-compliant development regulation (Footnote 9) substantially interferes with Goal
16 1⁶⁹ as it would potentially allow commercial/manufacturing type growth in an agricultural
17 area, growth more properly allowed in an urban area where adequate public facilities and
18 services exist. This regulation also interferes with Goal 2 which seeks to reduce the
19 inappropriate conversion of undeveloped land into sprawling, low-density development.⁷⁰
20 Finally, this regulation would substantially interfere with achievement of Goal 8, which seeks
21 to maintain and enhance natural resource-based industries, in this instance the agricultural
22 industry.⁷¹ It also fails to encourage the conservation of productive agricultural lands, and
23 encourages incompatible uses.⁷²
24
25

26 The de-designation of the Warta and Schwarz properties substantially interferes with Goal
27 8's requirement to conserve productive agricultural lands in order to maintain the agricultural
28
29

30
31 ⁶⁸ Vinatieri v. Lewis County, WWGMHB Case No. 03-2-0020c (Compliance Order, Jan. 7, 2005).

32 ⁶⁹ RCW 36.70A.020(1).

⁷⁰ RCW 36.70A.020(2).

⁷¹ RCW 36.70A.020(8).

⁷² RCW 36.70A.020(8).

1 industry of Clark County, an industry that relies on this land for its continued existence as
2 well as Goal 2's requirement to reduce sprawling, low-density development.

3 4 VI. FINDINGS OF FACT

- 5 1. Clark County is located west of the crest of the Cascade Mountains and is required
6 to plan pursuant to RCW 36.70A.040.
- 7 2. The Petitioners filed a timely Petition for Review (PFR) on February 12, 2009.
8 The PFR challenged two provisions of Clark County Ordinance No. 2008-12-15
9 (Ordinance).
- 10 3. The Challenged Ordinance, entitled *Comprehensive Plan and UDC Amendments*,
11 was adopted December 16, 2008, and amended UDC section 40.210.010 and
12 redesignated the Warta and Schwarz properties.
- 13 4. John and Georgiana Warta and Green Arbor Development, Inc. (Warta), Matthew
14 and Denise Houghton (Houghton) and Richard W. Schwarz, Walter O. Schwarz,
15 Jonathan and Victoria Schwarz (Schwarz Family) were granted the right to limited
16 intervention.
- 17 5. The Ordinance amended the County's UDC section 40.210.010, Forest,
18 Agriculture, and Agricultural-Wildlife District table 40.210.010-1, footnote number 9
19 (Footnote 9).
- 20 6. Prior to the 2009 amendments, the language of Footnote 9 authorized "commercial
21 uses supporting resource uses".
- 22 7. The original language of Footnote 9 referred to "commercial uses supporting
23 resource uses, such as parking, first stage processing and processing which
24 provides value added to resource products".
- 25 8. With the amendment, Clark County added language: "Facilities that repair,
26 maintain, refurbish or manufacture component parts for equipment utilized for
27 agricultural, forest and other resource based industries including wind, hydro and
28 solar generation " which is not included within the meaning or parameters of
29 "parking, first stage processing and processing which provides value added".
30
31
32

1 Some of the uses contemplated by Footnote 9 are agriculturally related while
2 others are not.

- 3 9. None of the uses contemplated by the amendment to the Footnote 9 are limited to
4 "accessory uses".
- 5 10. None of the uses contemplated by the amendment to the Footnote 9 are limited to
6 uses and activities that "support, promote or sustain agricultural operations and
7 production".
- 8 11. The Ordinance includes no requirement that the location, design, and operation of
9 Footnote 9 uses not interfere with, and in fact support, the overall agriculture use
10 of the property.
- 11 12. The Ordinance does not include any requirement that the Footnote 9 uses be
12 consistent with the size, scale and intensity of the existing agricultural use of the
13 property and the existing buildings on the site where they will be located.
- 14 13. The Ordinance does not include any requirement that the Footnote 9 uses be
15 located within the general area developed for buildings and residential uses.
16 The Ordinance does not include any requirement that the Footnote 9 uses limit the
17 conversion of agricultural lands to no more than one acre.
- 18 14. The Ordinance does not include any requirement that the location, design, and
19 operation of the Footnote 9 uses not interfere with, and in fact, support, the overall
20 agricultural use of the property.
- 21 15. The repair, maintenance, refurbishment or manufacture of component parts for
22 equipment utilized for forest and other resource-based industries, including wind,
23 hydro and solar generation, would not support, promote or sustain agricultural
24 operations and production.
- 25 16. The non-agricultural uses contemplated by Footnote 9 are unrelated to production
26 of agricultural products.
- 27 17. The Ordinance also amended Clark County's 20 Year Comprehensive Growth
28 Management Plan Map Designation and corresponding zoning maps for properties
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owned by Intervenor Warta and Green Arbor Development, Inc., as well as for properties owned by Intervenor Schwarz family.

18. The Comprehensive Plan and zoning map amendments changed the Warta and Schwarz properties from Resource Lands Agriculture (Ag-20) to Rural 5 (R-5). The Warta properties consist of three parcels totaling approximately 60 acres. Two of the Warta properties are improved with single-family residences and outbuildings, the third is unimproved.
19. Two of the Warta parcels, totaling 55 acres, currently support the grazing of cattle and qualify for a reduced tax assessment based on the agricultural use. Soil quality is low to moderately high, drainage varies from well-drained to poor, water capacity is moderate and permeability is moderate to very slow on the Warta properties.
20. The USDA Soil Conservation Service's survey classifies the soil type of the Warta properties as moderately productive. The soils are not classed as "prime" agricultural soil.
21. The Warta properties are in close proximity to areas developed for rural residences and the property is immediately adjacent to the recently expanded Washougal Urban Growth Area, an expansion which is now subject to appeal in the Court of Appeals.
22. The majority of the properties near the Warta properties, whether zoned R-5 or Ag-20, have been subdivided to 5 and 10 acre parcels. Notwithstanding the subdivision of properties in the area, lands to the North and East of the Warta properties are designated agriculture with Ag-20 zoning.
23. In order to preserve or foster the agricultural economy, a jurisdiction needs to focus on the agricultural industry as a whole.
24. The viability of the agricultural industry involves more than the mere conservation of land for production. There must be a significant base of land and production to support all of the agriculturally based businesses that are part of the industry,

1 including processors, suppliers, shippers, cold storage plants, equipment
2 repairers.

3 25. In combination, the lands, producers and support businesses constitute the
4 agricultural economy.

5 26. Clark County's analysis focused almost exclusively on the land itself and failed to
6 focus as well on the needs of the agricultural economy.

7 27. The Schwarz application in 2008 was processed as a request to re-designate their
8 properties from Resource Lands Agriculture to Rural Residential.

9 28. Clark County concluded that a mapping error had been made in 1998 and agreed
10 to take action to "correct" that error by adopting the Ordinance.

11 29. The only evidence in the record indicates that the three Schwarz properties total
12 approximately 57 acres. The existing land use of the Schwarz properties is
13 agriculture. All three parcels are improved with a single family residence and the
14 land is used and taxed at current use as farmland. Approximately 66% of the land
15 is prime farmland and is adjacent to a larger area consisting primarily of prime
16 farmland.

17 30. Any Finding of Fact later determined to be a Conclusion of Law is adopted as
18 such.

21 **Findings of Fact - Invalidity**

22 31. With this Final Decision and Order, the Board has concluded Clark County, with
23 the adoption of amendatory language set forth in UDC 40.210.010, Footnote 9,
24 has failed to comply with the GMA.

25 32. Footnote 9 fails to comply with RCW 36.70A.020(1), .020(2), .020(8), .060, and
26 .177.

27 33. Footnote 9 fails to comply with the GMA because it permits non-agricultural uses
28 within agricultural lands which do not conform to the requirements for such uses
29 set forth in RCW 36.70A.177.
30
31
32

- 1 34. With this Final Decision and Order, the Board has concluded Clark County, with
2 the de-designation of the Warta and Schwarz Properties, failed to comply with
3 RCW 36.70A.020(2), .020(8) and 36.70A.170.
4 35. The de-designation of the Schwarz properties failed to comply with the GMA
5 because the County did not properly review the change in designation pursuant to
6 the GMA's definition for agricultural lands.
7 36. With both de-designations, Clark County failed to review the agricultural viability of
8 these lands in the context of the local agricultural industry.
9

10 **VII. CONCLUSIONS OF LAW**

- 11
12 A. The Board has jurisdiction over the parties to this action as provided in RCW
13 36.70A. 250(1)(c).
14 B. The Board has jurisdiction over the subject matter of this action, as provided in
15 RCW 36.70A.280(1).
16 C. The Petitioners have standing to raise the issues in this case, as provided in RCW
17 36.70A.280(2).
18 D. Petitioners have demonstrated that Clark County, with the adoption of
19 amendments to UDC 40.210.010 as set forth in Footnote 9, has violated RCW
20 36.70A.020(1), .020(2), .020(8), 36.70A.060, and 36.70A.177.
21 E. Petitioners have demonstrated that Clark County violated RCW 36.70A.020(2),
22 .020 (8), RCW 36.70A.060, and RCW 36.70A.170 in de-designating the Warta
23 properties.
24 F. Petitioner has demonstrated that Clark County violated RCW 36.70A.020(2), .020
25 (8), RCW 36.70A.060, and 36.70A.170 in de-designating the Schwarz properties.
26
27
28

29 **Conclusions of Law – Invalidity**

- 30
31 G. Pursuant to RCW 36.70A.302(1), the Board may enter a Determination of Invalidity
32 upon finding a jurisdiction's action fails to comply with the GMA and that the

1 continued validity of the action would substantially interfere with the fulfillment of
2 the goals of the GMA.

3 H. The Board has found Clark County, with the amendatory language contained in
4 Footnote 9, failed to comply with the GMA.

5 I. The non-compliant development regulation (Footnote 9), substantially interferes
6 with RCW 36.70A.020(1) as it would potentially allow commercial/manufacturing
7 type growth in an agricultural area, growth more properly allowed in an urban area
8 where adequate public facilities and services exist.

9 J. The non-compliant development regulation (Footnote 9) interferes with RCW
10 36.70A.020(2) which seeks to reduce the inappropriate conversion of undeveloped
11 land into sprawling, low-density development.

12 K. The non-compliant development regulation (Footnote 9) would substantially
13 interfere with achievement of RCW 36.70A.020(8), which seeks to maintain and
14 enhance natural resource-based industries, in this instance the agricultural
15 industry.

16 L. The Board has found Clark County, with the de-designation of the Warta
17 properties, failed to comply with the GMA.

18 M. The de-designation of the Warta properties and the Schwarz properties
19 substantially interferes with RCW 36.70A.020(2) by failing to reduce the
20 inappropriate conversion of undeveloped land into sprawling, low-density
21 development.

22 N. The de-designation of the Warta properties and the Schwarz properties
23 substantially interferes with RCW 36.70A.020(8) by failing to encourage the
24 conservation of productive agricultural lands so as to maintain the County's
25 agricultural industry.

26 O. Any Conclusion the Law later determined to be a Finding of Fact is adopted as
27 such.
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VIII. ORDER

Based on the foregoing, Clark County is hereby ordered as follows:

1. Ordinance 2008-12-15 is remanded to the County to take action consistent with this Final Decision and Order.

2. Ordinance 2008-12-15 substantially interferes with fulfillment of the GMA goals and therefore the Board enters a Determination of Invalidity for the following provisions of the Ordinance:

A. Section 7, Subsection 3, page 7 of 8, Exhibit 24, (Clark County Unified Development Code 40.210.010 Forest, Agriculture and Agricultural-Wildlife District Table 40.210.010-1 (Footnote 9));

B. Section 3, Subsection 1, CPZ2006-00005 (Schwarz), (The Ordinance refers to Docket No. CPZ2006-00005. The Board assumes the correct Docket Number is CPZ2008-00005);

C. Section 2, Subsection 1, CPZ2008-00001 (Warta).

3. Clark County shall enact legislation to bring itself into compliance with the GMA as provided in this Amended Final Decision and Order in accordance with the following schedule:

Compliance Due	February 8, 2010
Statement of Actions Taken and Index to Compliance Record Due	February 22, 2010
Objections to Finding of Compliance Due	March 8, 2010
Response to Objections Due	March 22, 2010
Compliance Hearing	April 16, 2010

Entered this 10th day of August, 2009.

William P. Roehl, Board Member

James McNamara, Board Member

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Nina Carter, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and three copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives.

Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person, by fax or by mail, but service on the Board means **actual receipt of the document at the Board office** within thirty days after service of the final order.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).